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IN THE

Supreme Court of the United States

October Term, 1950

No. 168

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

On Writ of Certiorari to the Court of Claims

BRIEF FOR THE RESPONDENT

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December, 1950

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OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 115 C. Cls. 626.

JURISDICTION

The judgment of the Court of Claims was entered February 6, 1950 (R. 48). The petitioner's motion for a new trial was denied April 3, 1950 (R. 48). The petition for a writ of certiorari was filed June 30, 1950, and was granted October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a labor dispute arose between the operators of most of the nation's bituminous coal mines, including the respondent Pewee Coal Company, Inc., and the United Mine Workers of America (UMWA), the union representing the miners. On May 1, 1943, the Secretary of the Interior, acting under authority of an Executive Order, issued an "Order for taking possession" finding that a strike had occurred at the respondent's mine among others and taking possession of each such mine for operation by the United States in furtherance of the prosecution of the war. On October 12, 1943, the Secretary ordered that possession and control by the United States of respondent's mine and all others then possessed by the Government be terminated.

The questions presented are:

1. Was there a taking of respondent's property so as to require just compensation under the Fifth Amendment?
2. Whether, if there was such a taking, respondent is entitled to recover as part of just compensation the amount of increased wages which were paid by the respondent about June 30, 1943, upon the direction of the petitioner.

ORDERS AND REGULATIONS INVOLVED

Executive Order No. 9340 (8 F. R. 5695) under the authority of which the Secretary of the Interior took possession of respondent's mine is set forth in the Appendix, *infra*, pp. 48-49. The Secretary of the Interior's "Order for taking possession" (8 F. R. 5767) is set out in full in the Statement of the Case, *infra*, pp. 5-6. The Certificate of Appointment of Operating Manager for the United States of the respondent's mine is also set out in full in the Statement of the Case, *infra*, pp. 9-11. The Regulations for the Operation of Coal Mines under Government Control are printed in the Appendix to the Brief for the United States, Pet. Brief, pp. 100-137.

STATEMENT OF THE CASE

This is an action to recover just compensation for the respondent's coal mine which was taken from it May 1, 1943, by the Secretary of the Interior and was thereafter until October 12, 1943, possessed and controlled by the United States (R. 1-2). The Court of Claims held that the mine had been taken and ordered judgment for the respondent in the sum of \$2,241.26 representing the amount of increased wages which the respondent paid to its miners by direction of the Government during the period of United States possession (R. 41-47, 48).

The facts of the case are:

A

General Aspects of Coal-Mines Labor Dispute of 1943 and Government Seizure

1. *Events leading to Government seizure of mines.* When the United States entered World War II, the employment of a large majority of all bituminous coal miners was governed by contracts between mine operators and the United Mine Workers of America (R. 4-5). These contracts were to expire March 31, 1943, by their terms (R. 5).

Early in March, 1943, representatives of the operators and UMWA started negotiations in an effort to agree upon terms and conditions of employment which might succeed those of the contracts expiring March 31 (R. 5). The union made various demands and announced that it would challenge the "Little Steel" formula of the National War Labor Board which limited wage increases to 15 per cent. of January 1, 1941, pay (R. 5). On March 19, when no agreement had been reached, the operators proposed an extension of the existing contracts to April 30, pending continued negotiations, but the union thought negotiations should continue only upon the understanding that any terms and conditions agreed upon would be retroactive to April 1 (R. 5). The operators then appealed to the

President to intervene (R. 5). Upon a request of March 22 by the President, the operators and the union agreed to extend negotiations and the existing contracts for one month beyond April 1 with the understanding that any wage adjustments in a new agreement be retroactive to April 1 (R. 6).

Negotiations continued without apparent progress to an accord until on April 9 the southern operators asked the War Labor Board to take jurisdiction of the dispute, and on April 12 they made a similar request to the President (R. 6-7). In the meanwhile, on April 8, 1943, the President issued Executive Order No. 9328 (8 F. R. 4681) for "holding the line" of wages and prices (R. 7). The UMWA then offered to revise its wage demands by substituting therefor a guaranteed 6-day work week, and on April 13 the Director of the United States Conciliation Service and the President's personal representative in the negotiations made a similar suggestion (R. 7). Each proposal was rejected by the operators (R. 7).

On April 22, the Secretary of Labor certified the issues of the dispute to the War Labor Board (R. 7). The Board assumed jurisdiction and initiated proceedings to settle the matter (R. 7). The union, however, refused to participate in the proceedings and announced that it was no longer bound to continue the production of coal (R. 7). Strikes began in certain mines (R. 7). On April 27, after a fruitless directive to the union to end the spreading strikes, the Board referred the matter to the President (R. 7-8).

The President appealed on April 28 to the union to resume work and present the case to the War Labor Board (R. 8-9). He informed the union that, if work were not resumed by May 1, he would exercise his power as President and as Commander-in-Chief of the armed forces to protect the national interest and to prevent further interference with the prosecution of the war (R. 9). The union

replied that it believed that collective bargaining should be resumed (R. 9-10).

By April 30 the production of bituminous coal throughout the nation had virtually ceased as a result of the UMWA strikes (R. 9).

2. Government seizure of the mines. On May 1, 1943, the President issued Executive Order No. 9340 (8 F. R. 5695), *infra*, pp. 48-49, authorizing and directing the Secretary of the Interior "to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, . . . and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal" (R. 10).

Thereafter on the same day, the Secretary issued an "Order for taking possession" (8 F. R. 5767) whereby he took possession of some 3,000 mines, including all those of substantial size (R. 12-13). The terms of the order were:

"By virtue of the authority vested in me by the President of the United States, I hereby find from the available information that a strike or stoppage has occurred or is threatened in each of the bituminous coal mines operated by the companies specified in Appendix A attached hereto, and therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

"The President of each company (or its chief Executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to

do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

"All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"No person shall interfere with the operation of the mine by the United States Government, or the sale or distribution of the product thereof, in accordance with this order.

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

"Possession and operation of any mine may be terminated by the Secretary of the Interior at such time as he should find that such possession and operation are no longer required for the successful prosecution of the war."

Also on May 1, 1943, the Secretary of the Interior¹ promulgated his Order No. 1808 whereby he set up an organization to supervise and direct the operation of the

¹ By his Order No. 1807 issued May 1, 1943, the Secretary of the Interior delegated his power and authority under Executive Order No. 9340 to himself as Solid Fuels Administrator and to the Deputy Solid Fuels Administrator (R. 13). By his Order No. 1847 issued July 27, 1943, the Secretary revoked the previous delegation of authority to the Solid Fuels Administrator and the Deputy Solid Fuels Administrator and redelegated such authority to himself as Coal Mines Administrator and to the Deputy Coal Mines Administrator. As action by the Secretary thereafter was taken by him variously as "Secretary of the Interior", "Solid Fuels Administrator for War", and "Coal Mines Administrator" and as his authorities as such were substantially the same, he is referred to for convenience throughout this brief as "Secretary of the Interior" without regard to the designation of his formal capacity in respect of any particular action. Likewise, as his deputies exercised that same authority, action taken by them is referred to herein at times as action by the "Secretary of the Interior".

mines in his possession (R. 13-15). The field-office managers of the Bituminous Coal Division of the Department of the Interior were appointed Regional Bituminous Coal Managers with full powers of supervision and direction of the operation of the mines in their respective territories and with authority to issue specific directions as to the production, sale, and distribution of coal and all operating and financial arrangements of such mines (R. 13-14). The order made the compliance officers and other employees of the Bituminous Coal Division available to the Regional Managers to inspect the mines, and to report upon their operation, the sale and distribution of coal, and the manner in which the Operating Managers were discharging the responsibilities and obligations attaching to their service on behalf of the United States (R. 15). As for the Operating Managers appointed by the "Order for taking possession", *supra*, p. 5, Order No. 1808 described their status as follows:

"The Operating Managers for the United States appointed by me to operate the several mines possession of which has been taken by me, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and direction of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States" (R. 15).

On or about May 1, 1943, the Secretary of the Interior sent a telegram to the chief executive officer of each of the producers whose mines had been taken directing him to continue operations at the mines for the United States pending receipt of formal instructions and appointment as Operating Managers (R. 18-19). These telegrams of interim authority and direction read as follows: (R. 18-19)

"To assure production of coal necessary to win the war, President of the United States as Commander in Chief of the Army and Navy has directed me to

take over all bituminous coal mines of above-named company. You are being called upon as a loyal and patriotic American to serve as Operating Manager for the United States of the mines of your company and to continue operations at the mines for the United States. Formal instructions and appointment will issue upon your acknowledgment of this call to service by return wire in substantially following form:

"I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees, including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the (insert name of your mine or mines and sign, giving your address.)'

"All officials and employees are directed forthwith to perform their usual functions and duties in connection with mine operation, sale and distribution of product. Pending receipt of formal instructions and appointment, you are authorized and directed to continue operations at the mines for the United States. Fly the flag of the United States on the mining premises. Do all things necessary to assure operation of mines Monday. In operation of mines use existing managerial set-up so far as practicable and take all steps within your power to encourage miners to return to work under present wages and working conditions with understanding that any eventual wage adjustment will be retroactive. If any act transpires requiring maintenance of order by use of military forces, communicate with Regional Bituminous Coal Manager who is manager of field office of the Bituminous Coal Division for area in which mine is located for transmission of request to proper officials. The above-named Regional Manager is available for further instructions if required. In respect to all ordinary production and distribution problems, proceed, as far as practicable, in accordance with previously prevailing policies. Set books up so as to keep separate the period of Government operation. Continue personnel organization as nearly as practicable in accord with normal organiza-

tion. Advise all supervisory employees of the program. Be governed by all applicable state and federal laws consistent with the order pursuant to which you are acting. In respect to any mines which you are reasonably certain will continue in normal, regular operation, you may submit a recommendation that operation of such mine on behalf of the Government be terminated.

"If you are not acting as chief executive officer of the company, this telegram is to be considered as directed to the officer who is so acting."

About May 12, 1943, when the chief executive officers of the various producers to whom the Secretary of the Interior had sent his telegram of May 1 had acknowledged the "call to service" in the manner suggested, the Secretary issued them certificates of appointment in the following form (R. 19-21):

"Whereas, the Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:

"(1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.

"(2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

"(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

"(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

"(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to

the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

"(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules, and regulations issued by the Solid Fuels Administrator for War.

"(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

"(10) The Operating Manager shall, in such operation, distribution, and sale, comply with all applicable Federal and State laws and regulations.

"(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as 'Operating Manager for the United States (name of Company)', but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

"(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

"(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

"(14) This appointment shall be effective immediately."

On May 5 and 6, 1943, the Secretary furnished placards and posters to the Operating Managers with instructions that they be put up at various places on mine property and in mining towns, and a supply of booklets carrying an address by the President was also furnished with instructions that they be individually distributed to the miners (R. 21-22). The placards portrayed the American Flag and beneath it the words:

UNITED STATES PROPERTY!

**The Secretary of the Interior
Order for Taking Possession**

followed by the text of the "Order for taking possession", *supra*, pp. 5-6, (R. 22).

On May 19, 1943, the Secretary of the Interior promulgated Regulations for the Operation of Coal Mines under Government Control (8 F. R. 6655) (Pet. Brief 100-116; R. 21). These Regulations superseded all prior orders and instructions governing the operation of the possessed mines inconsistent with the Regulations (Sec. 603.3; Pet. Brief 101) and otherwise provided in material substance:

a. All duties and authorities set forth in the Regulations were to be construed in the light of the primary purpose of Government intervention to maintain full production of coal for the effective prosecution of the war (Sec. 603.4; Pet. Brief 101).

b. Control of operations would be exercised only to the extent necessary to maintain full production. Title to the properties remained in the owners, and the Government in temporary possession would assert only rights necessary to accomplish maximum production. Possession and operation were to be terminated as soon as possible without injury to the war program (Sec. 603.5; Pet. Brief 101-102).

c. Each Regional Manager was authorized, subject to orders of the Secretary of the Interior, to exercise

full supervision and direction over the mines in his territory and to issue directions as to production, sale, and distribution of coal and as to all operating and financial arrangements for such mines. (Sec. 603.12; Pet. Brief 104-105).

d. The operation of the mines would ordinarily be entrusted to the chief operating officer of the company formerly operating the mine who would act as Operating Manager for the United States while continuing to serve as an officer and employee of the company. Such person might be removed upon the request of the company in favor of an officer or employee nominated by the company and appointed by the Secretary of the Interior. Where the prompt cooperation of the company could not be secured, a person other than its officer or employee might be designated as Operating Manager by the Secretary (Sec. 603.15; Pet. Brief 106-107).

e. *"Status of Operating Managers"*

"Any officer or employee of a mining company who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

"The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect

of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concurrence before he takes such action. If consent is denied, the Operating Manager shall so report to the Regional Manager, stating the circumstances of the denial. The Regional Manager shall transmit the report to the Administrator, and the Operating Manager may proceed to take the action in question only upon direction of the Administrator.

"Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

"The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager." (Sec. 603.16; Pet. Brief 107-108).

f. "Duties of Operating Managers"

"Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

"An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as 'Operating Manager for the United

States, (name of Company)² (Sec. 603.17; Pet. Brief 108-109).

g. The Operating Manager should:

- (1) Submit to the Regional Manager a statement defining the properties under his management (Sec. 603.21; Pet. Brief 109).
- (2) Set up and keep books and records of the company so that the period of Government operation might be "readily separated from the operation of the company previously operating the mine as a private enterprise" (Sec. 603.21 (a); Pet. Brief 109-110).
- (3) Render such accounting as the Secretary might prescribe (Sec. 603.21 (b); Pet. Brief 110).
- (4) Enter into such financial transactions as were necessary to continue the enterprise, using the funds and property of the company, but making no major disbursements of any extraordinary nature without the approval of the Regional Manager (Sec. 603.22 (a); Pet. Brief 110).³

² By Amendment No. 1 to the Coal Mines Regulations issued July 29, 1943 (8 F. R. 10712), this provision relating to the duties of operating managers was amended by changing the period at the end to a comma and adding:

"as hereinabove and hereinafter specified. No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific direction or order by the Administrator to that effect. Nor shall any operations of any mine properly in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine properly in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator". (Pet. Brief 117-118).

³ The general prohibition against making major disbursements of an extraordinary nature without the Regional Manager's approval was eliminated August 13, 1943, by Amendment No. 2 to the Regulations (8 F. R. 11344) *infra*, p. 20, Pet. Brief 126). The prohibition was continued, however, and even expanded to stop dividend payments and the incurrence of abnormal indebtedness by Section 801.26 of the same Amendment No. 2 in the case of the Operating Manager for the mines of any coal company which did not formally agree to accept financial responsibility for the operations under Government control, *infra*, p. 21 (Pet. Brief 136).

(5) Inform, if necessary, all third persons with whom business might be transacted that such transactions were being carried on "under the authority of the Government and the company, in accordance with customary procedures and policies", that the company remained subject to the usual methods of enforcement of its obligations, and that the Government expected that the acts and agreements of the company would be accorded the same consideration and effect as in the absence of Government control (Sec. 603.22 (b); Pet. Brief 110-111).

h. Customary working conditions should be maintained, and Operating Managers should use customary personnel and "take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive" (Sec. 603.23 (a)-(d); Pet. Brief 111-112).

i. All officers and employees of the mines should be considered as called upon by Executive Order No. 9340 to serve the Government, but the Regulations should not be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment (Sec. 603.22 (d) (l); Pet. Brief 112).

j. Mining companies and their personnel and property were deemed to remain subject to all Federal and State laws and to the jurisdiction of Federal and State courts and agencies. Mining companies should remain subject to suit as theretofore with report to be made of any legal proceeding which involved question as to the rights of the United States (Sec. 603.24 (a) (b); Pet. Brief 112-113).

k. "The possessory interest of the United States in the properties of the companies is deemed to be pro-

ected by the criminal laws protecting United States property." (Sec. 603.24 (c); Pet. Brief 113).

l. The Regional Manager might issue instructions for the operation of a mine where prompt and effective cooperation of the company previously operating the mine could not be secured. Pending receipt of direction from the Secretary, the Regional Manager could deny access to the premises to "persons not contributing to the operation of the enterprise", prevent any interference with its operation, and see that the production of coal was continued (Sec. 603.30; Pet. Brief 113).

m. *"Removal of Operating Managers"*

"Upon failure of an Operating Manager to comply with these regulations or to the orders of the Administrator or the Regional Managers or upon failure of a mining company to respect the action taken by its Operating Manager who is an official of the company, the Regional Manager shall report to the Administrator the desirability of the removal of the Operating Manager, with such recommendations for a substitute as he may wish to make." (Sec. 603.31; Pet. Brief 113-114).

n. Government control might be relinquished upon presentation of satisfactory assurances to the Secretary of the Interior that under restored private control full operation would be continued and upon agreement by the mining company ratifying all acts by the Operating Manager, releasing the Government from all claims by reason of its possession and control of the mines, and holding the Government harmless from all liability arising out of acts performed during the period of possession and control. (See. 603.40 (g); Pet. Brief 114-116). In the absence of such an agreement, the Secretary of the Interior might return the

property to the company retaining such assets and rights as may be necessary

"to compensate for any reasonable expense incurred in the course of Government operation . . . and to meet all outstanding obligations incurred in connection with such operation. Pending an accounting and adjudication of all such claims, and of any other claims of interested parties, including any claims of owners based upon negligence in the management of the property, such portions of the property may be retained in Government control as shall appear to be adequate to cover all adjustments that may be required by such accounting and adjudication". (Sec. 603.40 (b); Pet. Brief 116).

The foregoing provision "n." of the Regulations was amended by Amendment No. 1 of July 29, 1943, to provide in substance as follows:

Government possession and control would be terminated upon the Secretary's determination that the requirements therefor specified in the War Labor Disputes Act, 57 Stat. 163, had been fulfilled. After termination, the Secretary might require the submission by any mining company of operating information relating to Government possession and control for the purpose of ascertaining the existence and amount of any claim against the United States (Pet. Brief 119).

The Operating Manager should advise the Secretary when, in his opinion, the requirements for termination of Government possession and control had been fulfilled (Pet. Brief 119).

Upon termination of possession and control, the mining company might elect to execute alternative instruments (Pet. Brief 120):

Instrument No. 1 adopting and ratifying all acts and omissions of the Operating Manager and agreeing that the Government and its officers should not be subject to claims by anyone by reason of its possession and

control. The delivery of Instrument No. 1 should constitute a waiver of any rights which the Government might have to an accounting with respect to its operations, and a discharge of the Operating Manager from any liability to the Government for actions taken by him (Pet. Brief 120-121).

Instrument No. 2 reserving the right to assert a claim for damage allegedly suffered by it as the direct result of a specific direction of the Secretary, but otherwise the same as Instrument No. 1, *supra*. Instrument No. 2 should specify the direction causing the damage, the action taken pursuant to the direction, and the nature of the damage. The delivery of Instrument No. 2 should constitute the same waiver by the Government as Instrument No. 1 with reservation, however, of the right to offset benefits of Government possession and control against any claimed liability (Pet. Brief 121-122).

If neither Instrument No. 1 nor Instrument No. 2 should be executed, the Secretary might assume that the company reserves the right to claim that operations had been for the account of the Government and that the Operating Manager and the company were accountable to the Government for the proceeds from operations. Pending such an accounting, the appointment of the Operating Manager should continue in force for such purposes. The Operating Manager and the company should forthwith furnish to the Secretary detailed accounting data certified in part by a certified public accountant and in remaining part by an officer of the company. Other pertinent data should be furnished as directed. Agents of the Government should have access to the books and records of the company in order to check data submitted. No action taken pursuant to the provisions of the amended Regulations should be deemed to be acquiescence by the

Secretary in any claim that the Government was liable for any action during its possession and control (Pet. Brief 122-125).

On August 13, 1943, by Amendment No. 2 to the Regulations, the Secretary of the Interior provided an "Interim procedure for confirmation of financial responsibility by mining company" whereby a mining company might, during the period of Government possession, deliver an instrument agreeing that all the acts and omissions of the Operating Manager had been and would be for the company's account, ratifying all the acts and omissions of the Operating Manager and agreeing that the Government should not be subject to any claims by reason of its possession and control, and certifying that the company would not dispose of its funds or incur any indebtedness which would impair its capital so as to jeopardize maximum production at its mines (Pet. Brief 126-127). The delivery of such an interim instrument should constitute a waiver of all rights of the Government to an accounting and a discharge of the Operating Manager from liability to the Government for his actions (Pet. Brief 127-128). The instrument should constitute a reservation of the company's right to assert a claim for damage allegedly suffered or threatened to be suffered as a direct result of specific direction of the Secretary provided timely specification of the direction, the action taken pursuant thereto, and the nature of the damage be made in respect of a direction made prior to the issuance of the amended Regulation and similar timely protest be made in respect of a direction made subsequent thereto (Pet. Brief 128-130). Upon the dispatch of such a protest, the direction should be suspended as it applied to the Operating Manager pending the Secretary's further directions (Pet. Brief 131). If the Secretary should confirm the direction, the company should be deemed to have reserved right

to assert a claim for damage allegedly resulting directly therefrom while the Government should be deemed to have reserved all rights to offset benefits from its possession and control and otherwise to defend against such claim (Pet. Brief 131-132). Failure to file a protest should be regarded as acquiescence in the company's liability for the consequences of action taken by the operating manager pursuant thereto (Pet. Brief 132). After the execution of an interim instrument of financial responsibility, the company might terminate the effectiveness of it as to future acts and omissions of the Operating Manager upon ten days' notice to the Secretary (Pet. Brief 133). No action taken pursuant to the provisions of Amendment No. 2 should constitute acquiescence by the Secretary in a claim against the Government arising out of its possession and control (Pet. Brief 134).

Also by Amendment No. 2, the Secretary ruled that, in the absence of an agreement "confirming" its financial responsibility for operations under Government possession and control, the Operating Manager should make no major disbursements of an extraordinary nature or dividend payments or incur any abnormal indebtedness without the approval of the Secretary. *supra*, p. 15, footnote 3 (Pet. Brief 136). It was further provided that the Secretary might direct such Operating Manager to submit certified periodic accountings of the operation of the mines and other data as to pertinent matters and that Government agents should be given reasonable access to all books and records of the company (Pet. Brief 136-137).

3. Effect of Government Seizure upon Strike and Subsequent History. On May 2, 1943, the next day after the taking of the mines pursuant to Executive Order No. 9340, the Secretary of the Interior conferred with the UMWA president and asked that the miners be recalled to work

pending a survey of the situation brought about by Government seizure (R. 15). Following this conference, the union announced a 2-week "truce" in the dispute beginning May 4 and requested the miners to "cooperate with your government" (R. 15). Immediately following the truce announcement President Roosevelt delivered a radio address in which he said that the War Labor Board was prepared to give the miners a fair hearing with wage adjustments, if any, retroactive to April 1 (R. 16). The miners began returning to work May 4, and operations became normal several days thereafter (R. 16). On May 17, after another appeal by the Secretary of the Interior, the UMWA announced an extension of the truce to May 31 (R. 16).

As soon as operations had returned to normal, the War Labor Board resumed its hearings but still without participation by the UMWA (R. 16). On May 25, it rendered a preliminary decision denying certain of the miners' demands and granting only those for an increase from \$20 to \$50 in vacation pay and for shifting certain occupational charges, such as for miners' lamps, from the workers to the operators (R. 16). In accordance with the Board's suggestion that the demands for a guaranteed 6-day work week and for portal-to-portal pay be negotiated further, negotiations were resumed between the operators and the union May 26 (R. 16). The talks became deadlocked (R. 16). On May 31, the expiration date of the truce, the Secretary of the Interior instructed the mines to make work available on June 1 (R. 16). On that day, however, another general strike started (R. 16).

On June 3, the President of the United States ordered the miners to return to work June 7 (R. 16-17). The UMWA thereupon voted to return to work on June 7 and extended the truce to June 20 (R. 17). Most of the miners returned to work on the day specified although absenteeism and sporadic strikes continued to prevail thereafter in

various sections (R. 17). Contract negotiations were renewed but brought no agreement (R. 17).

The War Labor Board rendered its final decision in the dispute June 18, 1943 (R. 17). It denied the portal-to-portal pay demand as beyond its jurisdiction and the demand for a guaranteed work week, and it extended the contracts which expired March 31, 1943, as modified by its May 25 preliminary decision, *supra*, p. 22, until March 31, 1945, unless changed by agreement before then (R. 17). The union announced that the miners would work for the Government under the decision but not for the operators (R. 17). Notwithstanding this announcement, a third general strike started June 21 (R. 17). Following an order by the UMWA to work under the Government until October 31, 1945, and a public statement by the President, the men gradually returned to work (R. 17-18). By July 6, the strike had ended although production remained substantially below pre-strike levels (R. 17).

On August 16, the Secretary of the Interior instructed all Operating Managers to supply information, including their opinion, as to whether productive efficiency had been restored to the level preceding Government control so that he could determine whether to release the mines (R. 25). Upon the information thus obtained, the Secretary terminated control of 48 mines on August 20 and 23 and of 370 mines on September 4 (R. 25).

On October 12, 1943, the Secretary of the Interior issued an order terminating Government control of all the mines not previously released (R. 25). This order was as follows:

"On the basis of available information and evidence, and after consideration of all the circumstances, and in accordance with the provisions of the War Labor Disputes Act of June 25, 1943 (Pub. No. 89, 78th Cong., 1st Sess.), I find that the possession and control by the Government of any and all of the coal mines now in the possession of the Government should be terminated.

"Accordingly, I order and direct that possession and control by the Government of any and all mines now in the possession of the Government, including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products, be, and they are hereby, terminated and that there be conspicuously displayed at the mining properties of each of such mines copies of a poster to be supplied by the Coal Mines Administration and reading as follows:

"NOTICE"

"Government possession and control of the coal mines of this mining company have been terminated by order of the Secretary of the Interior."

"Provided, however, that nothing contained herein shall be deemed to preclude the Administrator from requiring the submission of information relating to operations during the period of Government possession and control as provided in Section 40 of the Regulations for the Operation of Coal Mines under Government Control, as amended (8 F. R. 6655, 10712, 11344), for the purpose of ascertaining the existence and amount of any claims against the United States so that administration of the provisions of Executive Order No. 9340 (8 F. R. 5695) may be concluded in an orderly manner; and Provided further, That except as otherwise ordered, the appointments of the Operating Managers for the mines affected by this order shall continue in effect." (R. 25-26)

B

Respondent's Position in Labor Dispute and Government Seizure

1. *Position of respondent in events leading to Government seizure of mines.* The respondent, Pewee Coal Company, a Tennessee corporation, is engaged in the business of mining and marketing bituminous coal (R. 3). In 1940, upon land leased for a term of 40 years, it opened a mine at Garland, Tennessee, which passed from development to

production early in 1941 (R. 4). Thereafter it continuously produced coal from this mine until April 1943 except during a national strike of miners early in 1941 (R. 4).

In the spring of 1943, the respondent was a member of Southern Coal Operators Association (R. 4). Its 150 mine workers were members of the UMWA (R. 4). By reason of certain agreements between the Operators Association and the UMWA, the terms and conditions of employment at the respondent's mine were governed by the contracts between mine operators and the union which expired March 31, 1943, and were extended by mutual agreement of the parties to April 30, *supra*, pp. 3-4 (R. 4-5).

Although there is no explicit finding upon the subject, the respondent's mine presumably was shut down on or before April 30 by the general strike then existing, *supra*, p. 5.

2. *Government seizure of respondent's property.* Respondent was among the companies named in the "Order for taking possession", *supra*, pp. 5-6, whose property was taken by the Secretary of the Interior for operation by the United States (R. 12).

Respondent's president Frank Garland was designated by that Order as well as by the telegram of May 1, 1943, from the Secretary, *supra*, pp. 7-9, as Operating Manager for the United States and was instructed thereby to operate the mine and do all things necessary and appropriate for the operation of the mine and for the distribution and sale of the coal produced (R. 18-19). In the absence of Mr. Garland from the mine at the time the telegram of May 1 was received, respondent's superintendent wired the Secretary his undertaking to serve the United States in the language suggested by the telegram (R. 19). The superintendent raised the American flag at the mine and carried out the other instructions of the telegram (R. 19).

On May 12, having been advised that no acceptance of his designation as Operating Manager had been submitted by him, Mr. Garland telegraphed the Secretary in the language suggested and confirmed both the prior undertaking of the superintendent and his own (R. 19). On the same day the Secretary sent to Mr. Garland the formal certificate of appointment as Operating Manager for the United States which he issued to the chief executive of the other companies involved in the seizure (R. 19-20).

The placards portraying the American flag with the notice "United States Property!"*, *supra*, p. 12, were posted on the mine property in accordance with the Secretary's instructions (R. 21-22).

3. *Government control of respondent's property.* Shortly following the issuance of the Secretary of the Interior's "Order for taking possession" and by reason of the events described next above, the Government was in possession of the respondent's property. The United States immediately undertook to operate the mine and otherwise to exercise control over it especially through the duties imposed upon and authority vested in Mr. Garland by the terms of his appointment as Operating Manager for the United States and the Regulations for the Operation of Coal Mines under Government Control, *supra*, p. 25.*

The respondent's miners returned to work during the first week of May (R. 16). The operation of the mine thereupon ran into serious production difficulties (R. 39). First, from its reopening in May until July 6, 1943, the production of the mine was reduced through the loss of substantial working time because of the strikes in June and July, *supra*, pp. 22, 23 (R. 26). Also in May a "squeeze"

* Although the respondent's superintendent Mason had transmitted "acceptance" of the initial appointment as Operating Manager and apparently had assumed to act accordingly, it is believed (if it should be material) that Garland's later acceptance and affirmation of the superintendent's undertaking served to identify Mason's activities with Garland's, *supra* (R. 19).

or shifting and collapse of the roof of the mine developed in one entry, with the result that mining in that location became impracticable early in July (R. 30-31). More serious, in July, the main entry upon the continued advance of which the life of the mine depended was driven into an extensive "fault" or low-coal area (R. 31-32). After a futile effort had been made to drive through the fault in July, the mine superintendent and the respondent's engineer recommended that advance work be stopped and the mine be closed (R. 32-33). Operating Manager Garland, however, decided to continue operations (R. 33). The work thus continued (R. 33).

Under these circumstances, the mine was operated at a substantial loss: during the months of May, June, and July, the net operating loss was at the rate of approximately \$1.30 per ton of production and totalled slightly more than \$20,500 (R. 40). This rate of loss, together with the payment of more than \$2,200 made June 30, 1943, to the miners required by the Secretary to conform with the War Labor Board's decision, led Mr. Garland to write the Secretary July 22, 1943, stating that the mine could not meet its current bills, payroll, and other charges and asking that funds be supplied in order to keep the mine in production (R. 31). On July 31, the Secretary denied Mr. Garland's request, using in part the terms of that portion of Amendment No. 2 to the Coal Mine Regulations promulgated July 29 which recited that no mining operation should be for the account of the United States except by specific direction of the Secretary, *supra*, p. 15 (R. 31-32). By letter of August 3, Mr. Garland protested any requirement that the respondent absorb the loss attendant upon Government operation of its mine and asked that the Secretary issue a specific order to impose liability on the United States in this case (R. 35-36). No response was made to Mr. Garland's letter of August 3 until September 24 when the Secretary's deputy wrote him denying his request "on the basis of all the facts and circumstances"⁵ (R. 37-38).

⁵ The letter of September 24, 1943, from the deputy referred to a radio speech made July 20, 1943, at Cincinnati, Ohio, wherein he had stated that the Gov-

Mr. Garland, thereupon wrote the deputy advising him in substance that production at the property had been continued upon the assumption that operations were for the account of the Government and that, in view of the Government's position that respondent was responsible therefor, advance work at the mine was being discontinued and production would cease shortly (R. 38). The deputy replied on October 7 that "in the absence of a contrary direction by the Administrator, where the management has deemed it advisable for sound operating reasons to abandon operations at any particular mine, it may do so" (R. 38-39). After Mr. Garland's letter of September 28, no further advance work was performed in the mine, with the exception of a brief period in November, 1943, after Government control under the order of May 1 had been terminated⁶ (R. 39).

As required by his appointment and the Regulations, Mr. Garland operated the mine for the United States in substantial conformance with the respondent's policy and practice obtaining prior to the seizure: management and personnel remained as before and performed their customary functions in the regular course of business; no changes were made in internal operating methods; books and records of account were maintained in the same manner; and the mining operations were not shown to have

ernment "has not and does not intend to advance money to coal mining companies" (R. 37). It also called Mr. Garland's attention to Amendments Nos. 1 and 2 to the Coal Mine Regulations which, according to the deputy, "provide a procedure for mining companies to assert claims for liability against the Government, directly resulting from any specific direction or order" (R. 37). Amendments Nos. 1 and 2 to the Regulations are summarized, *supra*, pp. 15, 18-21, and set out in full in the Appendix to Brief for the United States, pp. 117-137. The Amendments provided procedures for mining companies to assert claims against the Government, but a condition of such procedures was that the claimant agree the entire operation of its mine by the Government had been for the account of the claimant except for damages represented to result directly from a specific direction of the Administration. By letter of September 17, Mr. Garland had "reiterated" his advice that "we are operating this mine for the account of the United States Government" (R. 37).

On January 1944, respondent obtained permission from its landlords to abandon the mine (R. 34). The mine was thereupon "robbed" of the coal remaining in the pillars supporting its roof and permanently closed in the spring of 1944⁶ (R. 39).

been in any respect different because of Government control (R. 40-41). In so managing the mine, Mr. Garland was at all times subject to removal from his position at the discretion of the Secretary of the Interior (Sec., 603.16 (d); Pet. Brief 108).

In connection with the routine administration of the mine by the Operating Manager in accordance with the general direction of the Government to continue operations, there were instances of specific instruction to him as to the details of management. Many of these instructions were embodied in the conditions of Mr. Garland's interim designation and formal appointment as Operating Manager and in the Coal Mines Regulations. Among the more significant of such instructions were to fly the flag of the United States on the mine premises, *supra*, p. 8; set books up so as to keep separate or render easily separable the period of Government operation, *supra*, p. 8, and Pet. Brief 109-110; enter into financial transactions necessary to continuation of the operation, using funds and properties of the respondent, *supra*, p. 10; inform banks, creditors, debtors, and other persons having funds and properties of the respondent that its rights thereto were in the possession of the Government and that the operation of the mine would be conducted for the Government, *supra*, p. 10; to be subject to such accounting as might be prescribed and to be governed by all orders, rules and regulations issued by the Secretary of the Interior, *supra*, p. 11, and Pet. Brief 108; to take action either under his customary title or as "Operating Manager for the United States" with the action in any case affecting Government possession and control to be considered as done by the Operating Manager, *supra*, p. 11, and Pet. Brief 108-109; to make no major disbursements of an extraordinary nature without the approval of the Regional Manager, *supra*, p. 15, Pet. Brief 110; to encourage miners to work with the understanding that eventual wage adjustments would be made retroactive,

supra, p. 16, Pet. Brief 111-112; and, if the respondent should not ratify all his acts as Operating Manager for the United States and release the Government from liability for its possession and control, reserving only the right to assert a claim for damage suffered as the direct result of a specific direction of the Government, to account to the United States for the proceeds from operations during Government possession and control and to make no dividend payments or incur any abnormal indebtedness without the consent of the Secretary of the Interior, *supra*, p. 21, Pet. Brief 136.

Furthermore, there were specific operating instructions issued to Mr. Garland by the Secretary outside those contained in his designation and appointment as Operating Manager or in the Regulations. Such instructions required, among other things, the posting of notices that the mine was United States property, *supra*, p. 26 (R. 21-22); the payment of increased vacation pay and refund of lamp rentals to employees (R. 21-22); the making of daily long-distance telephone reports of employment and production to the Regional Manager (R. 26); the reporting of costs and selling prices of mine-store supplies to the Secretary (R. 22); the operation of the mine six days a week (R. 23); and the submission of a certified statement of account for the period of Government operations pursuant to Sec. 801.40⁷ of the amended Coal Mines Regulations (R. 27-28).

The Court of Claims made no findings as to the total cost to the respondent of Mr. Garland's compliance with the Government's instructions to him as Operating Manager. It did find that the cost of paying increased vacation pay and refunding lamp rentals was \$2,241.26 (R. 23); the cost of the daily telephone calls was 60 cents a day or \$57.60 for the 96 working days from May 17 to September 3, 1943 (R. 25); and the cost of the employment

⁷ This section of the Regulations was referred to in the findings under its original designation of "Section 40" before it was incorporated in the Code of Federal Regulations (R. 27).

of certified public accountants to prepare the Operating Manager's accounting was \$125 (R. 29-30). Accordingly, the record shows that the respondent expended at least \$2,423.86 for Mr. Garland's compliance with specific instructions from the Secretary, of which all but \$125 was included in the computation of the net loss of \$36,128.96 incurred in the operation of the mine during Government possession and control.

The respondent has been reimbursed for none of these expenses resulting directly from the Operating Manager's compliance with specific instructions (R. 29).

4. *Release of property by the Government.* The circumstances under which respondent's mine was taken and operated by the United States showed practically from the inception that the Government purposed to restore it to the control of the respondent as soon as there might be assurance that the miners would work for the private owners under terms established in accordance with wartime procedures for the settlement of labor disputes, *supra*, p. 6. Return of the mine to the respondent conditioned upon assurance of continued normal production became definite when, after the passage of the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, the Coal Mines Regulations were amended to provide for the termination of Government possession and control upon the pertinent requirements of Section 3 of that Act (57 Stat. 164) which were, briefly, that any mine taken by the United States by reason of labor disturbance should be returned within 60 days after restoration of productive efficiency (Coal Mines Regulations, See. 801.40; Pet. Brief 119).

The Secretary of the Interior communicated with Mr. Garland July 29, August 16, and September 18, 1943, asking for information upon which he could determine whether respondent's mine might be released under the foregoing standards of the War Labor Disputes Act (R. 26-27). In response, Mr. Garland advised the Secretary that produc-

tive efficiency had not been restored (R. 26-27). Despite this advice, the Secretary promulgated his Order of October 12, 1943, *supra*, p. 23, terminating Government possession and control of respondent's property, but retaining the right to require the submission of information to ascertain the amount of any claims against the United States and continuing in effect the appointment of Mr. Garland as Operating Manager (R. 25-26).

In the absence of an agreement by the respondent ratifying and adopting Mr. Garland's acts as Operating Manager, the Secretary directed Mr. Garland on October 25, 1943, to comply with the provisions of Section 801.40 of the Regulations for an accounting of the mines' operations during the period of Government possession and control (R. 26, 27-28). On November 30, 1943, respondent submitted the required accounting together with a claim for reimbursement of the losses suffered in operating the mine for the United States (R. 28-29). The Secretary replied on December 14, 1943, advising the respondent that any claim must be prosecuted in accordance with the statutes and regulations relating to claims against the United States and that the data supplied by respondent was being compiled for use of the Government if the respondent should prosecute its claim (R. 29).

The Court of Claims held that the United States had taken respondent's property within the meaning of the Fifth Amendment and "is liable for whatever consequences flow therefrom" (R. 45). It thereupon held that the proof did not show that the respondent's operating loss was caused by the Government's seizure (R. 44). It finally held that the payment of increased compensation of \$2,241.26 to miners which the Secretary of the Interior had directed to be made in accordance with the War Labor Board's decision was "an extra expense of operation oe-

casioned by the Government, for which we think plaintiff is entitled to recover" (R. 47). Judgment for \$2,241.26 was accordingly entered (R. 48).

Judge Madden dissented on the ground that, whether there was a taking of respondent's property or not, the Court had not found what the losses to respondent would have been if the Government had not intervened and the strike had continued (R. 48).

SUMMARY OF ARGUMENT

A. The United States took property from the respondent on May 1, 1943, by seizing and operating its bituminous coal mine in order to assure production of coal needed to win the war.

The United States took constructive possession of the mine through the Secretary of the Interior's "Order for taking possession" issued May 1, 1943. It took actual possession of the mine through its agent, the Operating Manager for the United States. The telegram of May 1, 1943, from the Secretary of the Interior appointing an Operating Manager of respondent's mine for the United States and the acceptance of the appointment by the respondent's superintendent on that day constituted the manager an agent of the United States for taking possession of the mine and operating it for the Government.

The taking of the respondent's mine by the Government was similar to the Federal seizure and control of the railroads in World War I. The circumstances attendant upon the taking and operation of the railroads were so close to those affecting the seizure of the respondent's mine as to indicate that the legal incidents of possession were the same.

In taking respondent's mine, the Government took a recognized legal interest in the respondent's property, both real and personal, which will be protected by the Fifth Amendment.

United States v. United Mine Workers, 330 U. S. 258, suggests strongly that the Government's taking of respondent's mine was compensable under the Fifth Amendment. Although the Court in *United Mine Workers* did not examine or determine the relation existing in the 1946-47 seizure of the coal mines then before it, the practical effect of the holding that during such seizure the miners were employees of the Government is that the United States acted as proprietor of the mines.

B. Compensation for the taking of respondent's mine would include the rental value of the property at the time of taking and also the net losses suffered in its operation by the Government. As rental value is not shown in the record, whereas the net losses are proved, the respondent was entitled to recover only the amount of the loss. Because the judgment entered by the Court below represents an amount less than the loss suffered by respondent in the Government's operation of the mine, the judgment should not be disturbed except as the Court may direct judgment for the larger amount to which respondent was entitled.

ARGUMENT

Cessation of production in the bituminous coal fields in the spring of 1943 brought the United States face to face with the question of what exercise of its plenary power successfully to prosecute the war it should invoke to resume and maintain the necessary mining of coal. See *Hirabayashi v. United States*, 320 U. S. 81, 93. The respondent has no means of knowing what all the influences were which induced the United States to choose to accomplish its purpose through seizure of the producing properties rather than through any of the number of other ways available to it. See Hoague, Brown and Marcus, *Wartime Conscription and Control of Labor*, 54 Harv. L. Rev. 104; *Mobilization for Defense*, 54 Harv. L. Rev. 278; Teller, *Government Seizure in Labor Disputes*, 60 Harv. L. Rev. 1017, 1030; cf. *Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253.

The case, as stated herein, *supra*, pp. 3-33, shows clearly that in the crisis the United States elected to use and did use its right of eminent domain to seize and operate the mines through executive action of the Secretary of the Interior pursuant to the order of the President.

A

The United States Took Respondent's Property Within the Meaning of the Fifth Amendment.

The respondent asserts that the United States, in seizing and operating the mines in order to assure the production of coal needed to win the war, took its property within the meaning of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation". The taking of its property was complete on May 1, 1943, as shown by the expressions of Government possession and exercise of Government control in the "Order for taking possession" issued May 1, 1943, by the Secretary of the Interior under the authority of Executive Order No. 9340; in his appointment on that day and on May 12, 1943, of an Operating Manager for the United States over respondent's mine; in the various general orders and regulations and specific instructions issued by the Secretary during the period of Government operation; and in the operation of the mine for the purposes of the United States by the Operating Manager as an agent of the United States, all as fully set forth in the Statement of the Case, *supra*, pp. 3-33.

1. *The United States Took Possession of Respondent's Mine.* The plain intendment and effect of the Secretary's "Order for taking possession" of May 1, 1943, was to remove possession and control of the Pewee mine from the respondent to the United States. The order itself stated that as its effect: "I . . . take possession of each [specified] mine . . . for operation by the United States in furtherance of the prosecution of the war", *supra*, pp. 5-6.

The validity of Executive Order No. 9340 authorizing and directing the Secretary of the Interior to take possession and do everything necessary for or incidental to the production, sale, and distribution of coal is not here in question, and neither is that of the Secretary's "Order for taking possession". In these circumstances, it must be presumed that the Secretary took possession of respondent's mine as he specifically stated he did. *United States v. Chemical Foundation, Inc.*, 272 U. S. 14, 15; *Klamath and Modoc Tribes v. United States*, 296 U. S. 244, 253; *Wilkes v. Dinsman*, 7 How. 89. It is immaterial in this case, however, whether possession was obtained by the issuance of the "Order for taking possession" *per se*. Regardless of the effect of that order, it will be shown that actual physical possession of the mine and its connected property was taken by the Government.

a. *The Operating Manager for the United States Assumed Possession and Control of the Mine as Agent of the United States under authority of the Secretary of the Interior.* On May 1, 1943, at the outset of Government possession and control, respondent's superintendent accepted a temporary or interim appointment as Operating Manager for the United States of the Pewee mine by the Secretary of the Interior with both the authority and the obligation to continue operations at the mine for the United States, *supra*, pp. 25-26. Soon thereafter, respondent's president sent his acceptance of the same appointment to the Secretary and notified the Secretary that he confirmed the superintendent's acceptance.

The telegram of appointment addressed by the Secretary to the chief executive officer of respondent called upon that officer to "serve as Operating Manager for the United States" and to continue operations "for the United States", *supra*, pp. 7-9.⁸ It advised the Operating Man-

⁸ Order No. 1808 issued the same day by the Secretary as an organizational order directed similarly that "Operating Managers, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States . . .", *supra*, p. 7.

ager that formal instructions and appointment would issue upon his acknowledgment of "this call to service". The terms of an acknowledgment were suggested whereby the Operating Manager should undertake "to serve the United States and devote myself to the task of producing coal". The suggested acknowledgment recited that the American flag was being flown on the mine premises to show that the "property is being operated exclusively for the United States and that all employees, including myself, who serve the mines are serving their country."

The Secretary's telegram went on to give instructions to the Operating Manager as to the manner in which he should conduct operations for the United States. Among these instructions was one directing all officers and employees of the respondent "to perform their usual functions and duties in connection with mine operation, sale and distribution of product". Another required the Operating Manager to use the accustomed managerial and personnel organization and to proceed, so far as practicable, in accordance with previously prevailing policies.

Respondent's superintendent, upon his receipt of the telegram, immediately accepted the appointment in the exact language of the suggested acknowledgment and complied with all the Secretary's instructions. A few days later, placards portraying the American flag and bearing prominently the notice "UNITED STATES PROPERTY!" were posted on the mine premises as ordered by the Secretary of the Interior.

The appointment of May 1, 1943, and its acceptance created a relationship of agency between the United States as principal and the Operating Manager as agent. It is established that agency results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement of Law, 1 Agency, §1. Every element and detail of the appointment of the Operat-

ing Manager of respondent's mine indicate the existence of agency in him to operate the mine for the United States, and his operation of the mine in conformance with his authority was for the United States. Restatement of Law, 1 Agency, §§ 140, 144, 149.

Under these circumstances, no real doubt could exist that on May 1, 1943, the Government took actual possession of respondent's mine and its facilities. *Krug v. Fox*, 161 F. 2d 1013 (CA 4). The respondent submits that this Court has so held in the light of the implications of *United States v. United Mine Workers*, 330 U. S. 258, 263, 284, 289, decided upon the closely similar set of circumstances attendant upon a later seizure of the mines by the United States. The only distinction between the factual situation upon which the *United Mine Workers* decision was premised and that disclosed here, at least in respect of the question of possession, is that there the seizure had been accomplished by the Secretary of the Interior as directed by an Executive Order issued by the President under his constitutional authority as such and as Commander-in-Chief of the Army and Navy and the authority conferred upon him by the War Labor Disputes Act, 57 Stat. 163. Here, of course, the taking was completed before the enactment of the War Labor Disputes Act on June 25, 1943, and the Executive Order directing the seizure was issued under the same constitutional authority and that of unspecified "laws of the United States".⁹ As the War Labor Disputes Act was framed in the light of the seizure here at issue and as the exercise of executive power under that Act followed closely the procedures employed by the Government in the instant case, the presence of the authority of that Act in the

⁹ It should be noted that, in support of its argument that there was no Fifth Amendment taking of the respondent's mine, the petitioner assigns the failure of the Government to rely upon any of the eminent domain statutes (Pet. Brif., pp. 42-43). The petitioner remarks especially that the President did not invoke Title II of the Second War Powers Act, 56 Stat. 176, 177. In view of the President's reliance upon "laws of the United States" without specification, it is only fair to assume that the President in the critical state existing at the time contemplated invocation of any and all law, including eminent domain statutes, which might assist to accomplish the public purpose.

United Mine Workers seizure is inconsequential in applying the holding of the Court as to possession there to this case.

b. *The Taking of Respondent's Mine Is Assimilable to Government Seizure and Operation of Transportation Systems in World War I.* The seizure of the coal mines May 1, 1943, had a forerunning counterpart in the Federal government's seizure and operation of the transportation systems during World War I. The two seizures were so similar in scope and purpose and in many of the details of execution as to render the legal incidents attached by the Court to the earlier seizure persuasive in identifying the corresponding aspects of the coal-mines seizure.

By the Act of August 29, 1916, 39 Stat. 645, the President was empowered to take possession and assume control of any transportation system and use it for such purposes connected with the war emergency as might be necessary or desirable. The Act was enacted to meet a threatened strike of railroad workers which would have imperiled the military operations then being conducted in Mexico, Hull, *Federal Control of Railways*, 31 Harv. L. Rev. 860. Pursuant to this statute and by proclamation of December 26, 1917, President Wilson appointed the Secretary of the Treasury as Director General of Railroads with authority to administer the control of the railroads and took "conclusive" possession and control of the railroads effective December 28, 1917, for the Director General. The stated purpose of the seizure was that the railroads be used for the transportation of troops, war material and equipment and that, so far as their use be not required for that purpose, they be used "in the performance of such other services as the national interest may require, and of the usual and ordinary business and duties of common carriers". On March 21, 1918, Congress enacted legislation, 40 Stat. 451, which set forth in detail how the control assumed by the President should be exercised and provided authority in him to agree

with the railroads upon just compensation for the period of Federal control.

The President's proclamation of December 26, 1917, provided that, until the Director General should otherwise order, "the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operations thereof in the usual and ordinary course of business of common carriers in the names of their respective companies."¹⁰ 40 Stat. 90. It also provided in substance that carriers should not be levied upon but should be subject to all state and Federal laws except as such laws might be inconsistent with Federal control and that they should remain subject to suit and judgment, state taxation, and state police regulations.¹¹ Also, an order was promulgated by the Director General, providing that "no work involving a charge to capital account in excess of \$10,000 shall be contracted for or commenced unless it be authorized by the director of the division of capital expenditures". See *Chicago, Burlington & Quincy R. Co. v. Public Utilities Commission*, 68 Colo. 475.

The signs of similarity are marked.¹² Each seizure had its origin in labor difficulties. Each was directed by Presidential order to a member of the Cabinet for substantial execution. Each involved "possession and control" of an entire industry in wartime for a public use. Each con-

¹⁰ Somewhat later managing officials were required to sever their relations with private carriers and became exclusive representatives of the Railroad Administration. U.S.R.R. Adm. Bull. No. 4, pp. 113, 313.

¹¹ See *Missouri Pacific Railroad Co. v. Ault*, 256 U. S. 554, 558 footnote 2. By General Order No. 50 of October 28, 1918, the Director General directed that, as "suits are being brought and judgments and decrees rendered against carrier corporations . . . for which the said carrier corporations are not liable", suits (with some exceptions) which might have been brought against the carrier but for Federal control should be brought against the Director General. 256 U. S. 562, footnote 5.

¹² The indications of assimilation were especially noticeable during the first months of the seizures. Starting in March, 1918, Federal control of the railroads gradually was tightened. Commencing at the end of July, 1943, with Amendment No. 1 to the Coal Mines Regulations (Pet. Brief, p. 117), the Secretary of the Interior purported to modify some of the early structures of Government control.

templated the maintenance of operations in the usual course of business. Each reposed immediate management for the United States in the offices of the private owners. Each permitted performance of managerial duties by officers under customary designations. Each continued liability of the private owners to state laws, regulations, and taxation. Each imposed Government consent as a condition upon large and extraordinary disbursements. Each established workers in the industry as Government employees. Each was characterized during its course by the enactment of legislation "legalizing" the seizure, especially, by providing for the payment of compensation to the owners. Each provided that property in the possession of the Government should be protected by the criminal statutes protecting United States property.¹³ There is no significant reason perceived by respondent for distinguishing the relationship existing between the Government and the railroads in World War I from that between the Government and the respondent.¹⁴

The Court held that the Government had exclusive possession of the property taken by it under the Act of August 29, 1916, *Northern Pacific Railroad Co. v. North Dakota*, 250 U. S. 135, 148; *Duckett & Co. v. United States*, 266 U. S. 149; *Phelps v. United States*, 274 U. S. 341. In the premises it is believed that the Government took no less possession of the respondent's mine.

2. *The Taking of Possession of Respondent's Mine by the Government Was a Taking of Property.* The respondent maintains that it follows from the Government's possession of the respondent's mine, "including any and all real

¹³ *United States v. Kambeitz*, 256 F. 247.

¹⁴ If it be suggested that the United States retained the proceeds derived from the operation of the railroads whereas it released all claim to such proceeds in the instance of the mines and that that is significant, the answer would be that the Government has never released either respondent or its Operating Manager from accountability to the Government "for their custodianship and disposition of proceeds from operations accruing during the period of Government possession and control". Amendment No. 1 to Coal Mines Regulations, July 29, 1943, Pet. Brief 117, 122-123.

and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine", that the Government took property of the respondent within the meaning of the Fifth Amendment. It is, of course, not necessary for a taking of property that the interest taken be a conventional estate in either realty or personality. See, for example, *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *United States v. Willow Run Power Co.*, 324 U. S. 499, 502. But the petitioner intimates that there is no taking of property here because the Government did not declare that a recognized property interest is being transferred to the United States and assumes thus to distinguish the case from *United States v. Westinghouse Electric & Manufacturing Co.*, 339 U. S. 261; *United States v. General Motors Co.*, 323 U. S. 373; *United States v. Petty Motors Co.*, 327 U. S. 372; and *Kimball Laundry Co. v. United States*, 338 U. S. 1.

Quite contrary to petitioner's argument, the estates taken in *General Motors*, *Petty Motors*, *Kimball Laundry*, and *Westinghouse* were by classical standards estates less than freehold which are generally what the United States took here in respect of respondent's leasehold. 1 Tiffany, Real Property (3d ed.), § 25. There could be no reasonable ground for supposing that the law extends protection to the taking of a tenancy for a fixed term as in the cases cited while denying it to a tenancy at will: both are legally recognized interests in real property involving possession and the right to possession. 1 Tiffany, Real Property (3d ed.), § 155. The respondent had a transferable interest in the land with the landlord's consent, and consent was not denied in this case. The mere condition that the termination of the tenancy here taken was indefinite as to time and determinable only by the Government is immaterial: in that respect the tenancy was exactly the same as the "fixed" terms taken in the cases sought to be distinguished by the petitioner. It is also pertinent to observe

that the taking of railroad property by the Government in World War I was under circumstances similar to those in the seizure of respondent's mine at least as to the nature of the interest acquired by the United States, and the Court had no difficulty in finding there that compensation was required by the eminent-domain clause of the Fifth Amendment.¹⁵ *Duckett & Co. v. United States*, 266 U. S. 149, 151; *Marion & Rye Valley Ry. Co. v. United States*, 270 U. S. 280.

The respondent, accordingly, is content to adduce *General Motors*, *Petty Motors*, and *Kimball Laundry* as established authority for its proposition that that part of respondent's leasehold which the Government took for its use is property for which compensation must be paid under the Fifth Amendment. Although it is difficult, and perhaps idle, to sift out and attempt to treat separately the various items of property comprising respondent's business (which is broadly what the Government took), *United States v. Russell*, 13 Wall. 623, affords full protection against the appropriation of those interests of respondent taken by the Government which are not realty or closely related to realty.

3. *United States v. United Mine Workers*, 330 U. S. 258, Suggests Strongly the Concept of a Compensable Taking of Respondent's Mine. The Court of Claims found support in *United States v. United Mine Workers*, 330 U. S. 258, for its conclusion that there was a taking of respondent's mine under the Fifth Amendment. The Court in *United Mine Workers* noticed the general problem of the relationship existing between the Government and the owners of the mines during the period of Government control there considered. It refused, however, to express an opinion as to

¹⁵ The Court noticed an analogy between a general receivership and the Government's occupation of the railroads. *Missouri Pacific Railroad Co. v. Ault*, 256 U. S. 554, 559. The petitioner notices at some length an analogy between receivership and the Government's "take-over" of the coal mines. Pet. Brief, pp. 68-86.

the validity of certain specific regulations¹⁶ representing an attempt to define the respective powers and obligations of the Government and the private operators, stating that such regulations would have "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers." 330 U. S. 288.

While declining to examine the effect, if any, of particular regulations upon the Government-operator relationship, the Court in defining the status of the Government as employer and that of miner as employee for the purpose of enjoining assistance in a strike held in effect that the United States enjoyed a most substantial interest in management control of labor. Any interest of sufficient substance to extend to protection against encouragement of a strike would necessarily have also to embrace control over less consequential details of work out of which strikes notoriously grow. Such details would include the subjects of collective bargaining beyond wages and hours as, for example, discharge, lay-off, recall, discipline, promotion and demotion, assignment and transfer, and matters of safety, sanitation, and comfort. They might also include other details commonly regarded as the prerogatives of management but which are frequently claimed by labor as subjects for collective bargaining: size, personnel, quality, and other conditions of supervision, location and extent of work, and the methods and means of mining, preparing, and loading coal. See *Jones & Laughlin Steel Corp. v. United Mine Workers*, 159 F. 2d 184 (CA DC). Indeed, the entire recent history of labor struggles in the coal industry in respect both of private operation and of public control has been steeped in recognition of the simple fact that he who controls the miners controls the mine.

¹⁶ The substance of these regulations was contained in the Coal Mines Regulations governing the operation and control of respondent's mine: operations should not be for the account of the Government (incorporated in the instant Regulations by Amendment No. 1 of July 29, 1943, Pet. Brief 118); and private owners should continue liable for all Federal, State, and local taxes and remain subject to suit (Pet. Brief 112).

"Every employee, from the very fact of employment in the master's business, is required to act in his interest. He owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control, and all employees may, as to third parties, act in the interests of the employer to such an extent that he is liable for their wrongful acts." *Packard Motor Car Co. v. National Labor Relations Board*, 330 U. S. 485, 488.

It is submitted that the Government as employer of coal miners for any purpose has by that status alone operational control of the mine "in as complete a sense as if the Government held full title and ownership". *United States v. United Mine Workers*, 330 U. S. 258, 284.

B

Respondent is Entitled to Recover as Compensation the Amount of the Judgment Below.

It is the position of respondent that the proper measure of compensation for the taking of its mine includes its rental value at the time of the taking, *United States v. General Motors Corp.*, 323 U. S. 373; *United States v. Petty Motors Company*, 327 U. S. 372; *Kimball Laundry Co. v. United States*, 338 U. S. 1; and that such measure includes also the net losses suffered in the operation of the mine by the Government. *United States v. Russell*, 13 Wall. 623; *Kimball Laundry Co. v. United States*, *supra*. The record lacks evidence upon which the market value of the interest in respondent's property taken by the United States could be determined. There is no dispute, however, that the respondent lost \$36,128.96 in the Government's operation of the mine for its purposes, *supra*, pp.

Just compensation for a taking is adjudged on the basis of what the owner loses, not what the taker gains. *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189.

The net amount by which the costs of operating the mine by the United States exceeded its realization therefrom is not only a factor in determining the value of the property taken but is the practical equivalent of part of that property.

The petitioner seized all the mining properties of the respondent, including its funds. It thereafter incurred expenses in the employment of labor, the purchase of supplies, and the accomplishment of all things necessary to continue operations at the mine. It met those expenses through the use of the money, credits, and other property of the respondent. At the same time it received income from the sale of coal and store supplies, the rental of miners' houses, and perhaps from other activities in connection with its operation of the mine. The expenses thus incurred by the petitioner exceeded the income received by it from the operation of the mine by the amount of the net loss, or \$36,128.96.

The value to the respondent of this property taken by the petitioner in this respect is represented by the amount of the net loss. As the total net loss which the respondent was entitled to recover was many times larger than the amount of the judgment awarded by the Court as compen-

sation for its loss, the judgment should not be disturbed except as the Court may direct the entry of judgment for the larger amount.¹⁷

CONCLUSION

For the foregoing reasons, the respondent submits that the judgment of the Court of Claims should be affirmed.

BURR TRACY ANSELL,
Attorney for Respondent

December, 1950.

¹⁷ The Court is asked to observe that, although the Court of Claims found that there was here a compensable taking under the Fifth Amendment, it has awarded the respondent as compensation only the amount which it paid out in increased wages *without the allowance of interest* (R. 48). No reason is supplied by the Court of Claims for this apparent deviation from practice and authority in "taking" cases. It may represent a reapplication of that court's denial of its jurisdiction to award interest when action is brought upon an implied contract arising out of a taking. Cf. *Booth & Co. v. United States*, 61 C. Cls. 805, 815-816 (1926). This Court in *Phelps v. United States*, 274 U. S. 341, 344 (1927) pointed out the fallacy in that reasoning of the Court of Claims and reversed its judgment denying interest in a case on all fours with the *Booth* case. See 61 C. Cls. 1044. The respondent would, upon the theory embraced by the Court of Claims in deciding the case, be entitled to interest upon its judgment from June 30, 1943, when it made the payments for which the Court of Claims has ordered recovery, *supra*, p. 27.

APPENDIX

Executive Order No. 9340 (8 F. R. 5695) issued May 1, 1943, which is reproduced in the Findings of the Court of Claims (R. 10-11), provided:

Whereas widespread stoppages have occurred in the coal industry and strikes are threatened which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

Whereas the officers of the United Mine Workers of America have refused to submit to the machinery established for the peaceful settlement of labor disputes in violation of the agreement on the part of labor and industry that there shall be no strikes or lockouts for the duration of the war; and

Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppage or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work:

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, as President of the United States and Commander-in-Chief of the Army and Navy, it is hereby ordered as follows:

The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may

for the effect of its progeny
that mines will be used to
protect the interests of the



designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

The Secretary of the Interior shall make employment available and provide protection to all employees resuming work at such mines and to all persons seeking employment so far as they may be needed; and upon the request of the Secretary of the Interior, the Secretary of War shall take such action, if any, as he may deem necessary or desirable to provide protection to all such persons and mines.

The Secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

Possession and operation of any mine or mines hereunder shall be terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program.